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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 494

NORMAN MASTRIAN, *Petitioner*,

vs.

STATE OF MINNESOTA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

NORMAN MASTRIAN, *Appellant*,

vs.

STATE OF MINNESOTA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue, to review the per curiam opinion and judgment of the Supreme Court of the State of Minnesota made and entered June 28, 1963, in the above-entitled case, wherein it was entitled State of Minnesota, Respondent, vs. Norman Mastrian, Appellant.

1. The official reference of the opinion and decision rendered in the Supreme Court of Minnesota is file number 39134. The opinion and decision are reported in 122 N.W. 2d 621. A copy of said opinion is hereto appended.

2. The date of the judgment sought to be reviewed is June 25, 1963. The opinion was filed on June 28, 1963.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257 (3).

4. The ground on which the jurisdiction of this Court is invoked is that the Supreme Court of the State of Minnesota has decided a federal question of substance in a way not in accord with applicable decisions of the Supreme Court of the United States.

QUESTION FOR REVIEW

The question presented for review is:

1. Where a family man with limited financial resources who has lived all his life in the State of Minnesota and never been incarcerated in a penal institution is charged with first degree murder, is $100,000 bail "excessive" under the Eighth Amendment to the United States Constitution when it is shown that bail in that amount is above the norm for this offense and the State produces no evidence to explain the deviation from the norm?

CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. State of Minnesota Constitution, Article I, Section 5.

"* * * Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted."

3. State of Minnesota Constitution, Article I, Section 7.

"* * * All persons shall before conviction be bailable by sufficient sureties except for capital offenses when the proof is evident or the presumption great; * * *."

STATEMENT OF THE CASE

On May 8, 1963, an indictment was returned by the Ramsey County Grand Jury in the State of Minnesota charging the petitioner with murder in the first degree.[1] The petitioner had previously been arrested by the City of Saint Paul Police Department on April 18, 1963, and a complaint was filed at that time charging the petitioner with first degree murder. Thereafter, bail was set by a Judge of the Municipal Court of the City of Saint Paul in the amount of $100,000. After the indictment was returned by the Ramsey County Grand Jury, bail was set by the Ramsey County District Court in the amount of $100,000.

The petitioner then filed a motion to reduce bail in the State District Court of Ramsey County and arguments on the motion were heard by the Court on May 22, 1963.[2] In support of the motion for reduction of bail, the petitioner submitted to the Court affidavits by his mother, his attorney and himself.[3] The motion to reduce bail in the District Court was based on the following ground as set forth in the motion:

> "* * * For the reason that the $100,000 bail previously set is arbitrary, unreasonable and excessive and violates provisions of the United States Constitution and the Constitution of the State of Minnesota."

Petitioner's memorandum of law and oral argument submitted to the Court on the motion to reduce bail specifically stated that the $100,000 bail was arbitrary and excessive under Amendment VIII to the United States Constitution and

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[1] A copy of the indictment is set forth in the appendix as Exhibit 1.

[2] A copy of the motion to reduce bail is set forth in the appendix as Exhibit 2.

[3] The affidavits are set forth in the appendix as Exhibits 3, 3A, 3B, 3C.

Sections 5 and 7 of Article I of the Minnesota Constitution. On May 23, 1963, Ramsey County District Judge John W. Graff filed an Order denying the motion for reduction of bail and attached thereto a memorandum of law in connection with his Order denying the reduction in bail.[4]

On June 14, 1963, the petitioner appealed to the Supreme Court of Minnesota, the court of last resort in Minnesota, from the District Court's Order of May 23, 1963, denying the reduction in amount of bail.[5] Briefs were filed by the petitioner and the State, and the matter was decided by the Minnesota Supreme Court on the briefs without oral argument. On June 28, 1963, the Court in a per curiam decision affirmed the ruling of the trial court in denying the motion to reduce the $100,000 bail.[6] At the present time, the petitioner is incarcerated in the Ramsey County Jail in Saint Paul, Minnesota, under $100,000 bail.

The indictment in this case charging petitioner with murder in the first degree alleges that petitioner murdered one Carol Thompson. Two other individuals have been indicted by the Grand Jury for the same crime. While the indictment against each of the three defendants alleges that the particular defendant did the actual killing, the State has indicated it intends to prove that Saint Paul attorney T. Eugene Thompson, the husband of the victim Carol Thompson, contacted petitioner Mastrian to hire another person to murder his wife. It is contended that petitioner hired one Dick W. C. Anderson to do the actual killing. Bail was also set by the District Court in the amount of $100,000 on defendants

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[4] The Order and opinion are listed in the appendix as Exhibit 4.

[5] The notice of appeal is set forth in the appendix as Exhibit 5.

[6] The opinion of the Minnesota Supreme Court is set forth in the appendix as Exhibit 6.

T. Eugene Thompson and Dick W. C. Anderson. Anderson has not been able to meet the bail and remains in jail. Thompson met the $100,000 bail and has been released from custody.

ARGUMENT

The Eighth Amendment to the United States Constitution relates to the question of bail. It provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Minnesota Constitution has two provisions relating to bail—the first of which is almost a direct quote of the United States Constitution's Eighth Amendment. Article I, Section 5 provides that:

> "Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted."

The due process clause, Section 7 of Article I, contains the second Minnesota Constitution provision relating to bail, as follows:

> "* * * All persons shall before conviction be bailable by sufficient sureties except for capital offenses when the proof is evident or the presumption great; * * *."

It is petitioner's contention that the $100,000 bail set for the petitioner in this case is "excessive" under the Eighth Amendment to the United States Constitution and that the Minnesota Supreme Court in affirming the lower court's order denying the motion to reduce the $100,000 bail decided a federal question of substance not in accord with decisions of the United States Supreme Court. Obviously, the word

"excessive" as applied to bail matters cannot be defined precisely so that any court would know in a given situation exactly when bail is "excessive". However, certain standards have been set forth in statutes and cases to guide the courts in their determinations in setting bail. In general, bail is to be fixed at an amount reasonably calculated to hold the accused available for trial and its consequence. *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951). Rule 46(c); Federal Rules of Criminal Procedure, 18 U.S.C., sets forth the standards in the Federal Courts, as follows:

> "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

The Minnesota Supreme Court, prior to the opinion in the instant case, set forth its ideas on the purpose of bail. In *Application of Shetsky*, 239 Minn. 463, 60 N.W. 2d 40, 46 (1953), the Court said:

> "The primary purpose of bail in a criminal case is not to increase the revenue of the state or to punish the surety but to insure the prompt and orderly administration of justice without unduly denying liberty to the accused whose guilt has not been proved. Its purpose is to relieve the accused of imprisonment and the state of the burden of detaining him pending the trial and at the same time, by placing him in the protective custody of a surety—a jailer of his own choosing, to insure his presence for trial at the call of the court without in any way delaying, impairing, or unduly burdening the administration of justice or in any manner prejudicing the state in its prosecution."

The United States Supreme Court has enunciated some of the factors a Court should take into consideration in its attempt to arrive at a logical determination as to the amount of bail that would be reasonable in a particular case. In *Carbo v. U. S.*, 82 S. Ct. 662, 665 (1962), the appellant was attempting to get bail on appeal from a conviction and 25-year sentence for violations of the Anti-Racketeering Act and the interstate extortion statute. Mr. Justice Douglas, in discussing some of the elements to be considered in fixing bail, used these words:

> "The right to bail is an important part of our criminal procedure and is not to be denied merely because of the community's resentment against the accused nor because of an evil reputation. While a bond is usually required to insure the defendant's appearance, 'There may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of the modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture.'"

There are other considerations. When a man is imprisoned because he is unable to meet the bail, he has no opportunity to investigate his case or effectively cooperate with his lawyer and prepare his defense. Further, as a practical matter, he cannot while incarcerated earn money which is essential for the protection of his family and the costs of his defense. See, generally, *Bandy v. U. S.*, 81 S. Ct. 197 (1960).

It is the petitioner's position with respect to the setting of bail in this matter that the State has consistently argued for an amount of bail greatly in excess of the norm for the crime charged in the State of Minnesota and thus the bail is excessive under the Eighth Amendment to the Constitution. This aspect of the bail problem was discussed in *Stack v. Boyle*,

342 U.S. 1, 6, 72 S. Ct. 1, 4, 96 L. Ed. 3 (1951). In that case, twelve defendants were indicted in the Southern District of California and charged with violating the Smith Act. Bail was eventually fixed at $50,000 on each petitioner. It was not denied in that case that the bail was higher than that usually imposed for offenses with like penalties. Mr. Chief Justice Vinson discussed the matter, as follows:

> "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. * * * If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved."

There appears to be no question but that bail in the amount of $100,000 for a first degree murder charge in the State of Minnesota is an unusually high bail and certainly far above the norm. The affidavit of petitioner's attorney reflects the bail that has been set in various well-known murder cases in Minnesota and also shows that the bail list in the Hennepin County (which includes the City of Minneapolis) Attorney's office suggests that bail shall be in the amount of $10,000 for first degree murder. This bail list does not mean that the Hennepin County Attorney would not ask for a higher bail in a particular murder case but it does reflect the normal bail for this type of offense.

In this case, the State has presented only the bare allegation in the indictment that the petitioner is charged with first degree murder. There is no allegation of any kind that the petitioner would flee the jurisdiction or that he would impede the due administration of justice by threatening witnesses or by doing any other act. The affidavits on file on behalf of the

petitioner reflect that the petitioner, his parents, and his entire family have lived in this area all of their lives. They have all worked here, own homes and have raised their families here. In addition, the affidavits show that petitioner went to school in Minnesota, is a member of various organizations in the City of Minneapolis, owns a home and is generally a man of limited financial resources. The affidavits further show that he has never been incarcerated in a penal institution. It is the petitioner's contention that if the State wanted bail set in an amount beyond the norm for the crime charged in this case, evidence should have been introduced to justify the request for the unusually high bail. Petitioner has argued at each stage of this proceeding that the State should come forward with any evidence it might have but none was ever produced. Consequently, the petitioner contends that $100,000 on a family man under the facts as known to the Court is arbitrary, unreasonable and excessive under the Eighth Amendment to the United States Constitution.

Two other defendants in this matter are also held under $100,000 bail. One of the defendants, Dick W. C. Anderson, has not met the bail and is still in jail. The other defendant, T. Eugene Thompson, husband of the alleged victim, Carol Thompson, has met the $100,000 bail and is free.[7] This aspect of the bail situation, where an amount of bail is requested in the same amount for different defendants, was discussed by Mr. Justice Jackson in the *Stack* case, as follows:

> "Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge, defendants do not lose their separateness or identity. While it might

[7] On March 27, 1963, three weeks after his wife's death, Thompson caused his personal financial statement to be published in the Saint Paul Dispatch newspaper. The financial statement listed his net worth at $115,000 with gross income of $41,693 in 1962, $36,196 in 1961 and $30,358 in 1960.

be possible that these defendants are identical in financial ability, character and relation to the charge, elements Congress has directed to be regarded in fixing bail, I think it violates the law of probabilities."

The bail set for petitioner and the other two defendants should depend on the circumstances and the facts regarding each individual's particular situation. That has not been done in this case. A blanket bail has been set for the crime charged—not for the circumstances of each individual's financial ability, family background and history.

It may well be that $100,000 bail for a person with great resources might not be adequate to insure that person's availability for trial. That is not the situation with this petitioner. There exists a great difference in the financial resources and background of the defendants in this case. Bail in the amount of $100,000 for this petitioner with his limited financial resources and background is clearly excessive and, in effect, deprives the defendant of his right to bail.

WHEREFORE, petitioner prays that this Court hear and pass upon these matters, by issuance of its Writ of Certiorari.

Respectfully submitted,

JONAS G. SCHWARTZ
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Minneapolis, Minnesota

COCHRANE, THOMSON & BRESNAHAN
830 Minnesota Building
Saint Paul, Minnesota

EDWARD J. DRURY
830 Minnesota Building
Saint Paul, Minnesota

APPENDIX

Exhibit 1

STATE OF MINNESOTA, COUNTY OF RAMSEY
In the District Court, Second Judicial District

THE STATE OF MINNESOTA

vs.

NORMAN MASTRIAN

INDICTMENT

Norman Mastrian is accused by the Grand Jury of the County of Ramsey, by this Indictment, of the crime of Murder in the First Degree committed as follows:

The said Norman Mastrian on the 6th day of March, A.D. 1963, at the City of Saint Paul in said County then and there being, did wilfully, unlawfully and feloniously, without authority of law and without excuse or justification, and with a premeditated design on the part of him, the said Norman Mastrian, Defendant, to then and there effect the death of a human being, to wit: one Carol Thompson, did kill and murder the said Carol Thompson by means of a weapon, to wit: a gun, a more particular description of said gun being to this Grand Jury unknown, by striking and beating the said Carol Thompson with said gun, and by means of a weapon, to wit: a knife, a more particular description of said knife being to

this Grand Jury unknown, by then and there stabbing the said Carol Thompson with said knife and thereby because of the striking, beating and stabbing, did inflict upon the body of said Carol Thompson mortal wounds of which said mortal wounds the said Carol Thompson did languish, and, languishing, did live for several hours, and then said Carol Thompson did die on March 6, 1963, of the mortal wounds and injuries so by the said Defendant inflicted as aforesaid, Contrary to the form of the Statute in such cases made and provided, and against the peace nd dignity of the State of Minnesota.

Dated at the City of Saint Paul, in the County of Ramsey and State of Minnesota, this 8th day of May, 1963.

KARL V. KLEIN
Foreman of Grand Jury

Names of witnesses examined before the Grand Jury:

John Mercado	George Barkley	T. Eugene Thompson
John Perry	Richard Sharp	John S. Connolly
Karin Lawler	Larry McMullen	Sheldon Morris
Theodore Elzerman	Vernon Phillips	(with waiver)

Presented to the Court in open court by the Forman of the Grand Jury, in the presence of the Grand Jury, and filed with the Clerk this 8th day of May, 1963.—E. J. FITZGERALD, Clerk, by GEORGE F. KNOPH, Deputy.

Exhibit 2

State of Minnesota
County of Ramsey

District Court
Second Judicial District

STATE OF MINNESOTA

vs.

NORMAN MASTRIAN

MOTION TO REDUCE BAIL

To the Honorable Judge of said Court:

The defendant moves the Court for an order reducing the bail in the above entitled action for the reason that the $100,000 bail previously set is arbitrary, unreasonable and excessive and violates provisions of the United States Constitution and the Constitution of the State of Minnesota

EDWARD J. DRURY
Attorney for the Defendant
809 Commerce Building
St. Paul, Minnesota

Exhibit 3

State of Minnesota
County of Ramsey.

In the District Court
Second Judicial District

STATE OF MINNESOTA

vs.

NORMAN MASTRIAN

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

Norman Mastrian, being first duly sworn on oath, deposes and states as follows:

That he purchased his home at 8032 Madison Street Northeast, Spring Lake Park, Minnesota, in 1958 for approximately $17,900.

That he paid approximately $4,700 as a down payment on the house which he obtained from the sale of his car and savings.

That the mortgage on the home is held by Minneapolis Savings and Loan Association and that his father-in-law holds a contract for deed on the home in the amount of $2,500.

That his father-in-law has made the payments on the mortgage since your affiant was injured in an automobile accident and that your affiant makes payments to his father-in-law on the home.

That he owns a 1955 Oldsmobile valued at approximately $250.00.

That he and his wife own the household goods most of which were purchased new when they were married in 1957.

That he owns approximately 400 shares in Telostat Corporation, where he worked in late 1951 and early 1962 which to the best of his knowledge and belief is now worth approximately 38 cents per share.

That he has savings in low four figures.

NORMAN MASTRIAN

(Jurat)

Exhibit 3A

State of Minnesota
County of Ramsey

District Court
Second Judicial District

STATE OF MINNESOTA, *Plaintiff*

vs.

NORMAN MASTRIAN, *Defendant*

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

Norman Mastrian, being first duly sworn on oath, deposes and states as follows:

That he is the defendant in the above entitled action.

That he was born in Duluth, Minnesota, on December 7, 1924, and attended St. Anthony parochial grade school in that city.

That his family moved from Duluth to Minneapolis in 1936 and thereafter he completed the seventh and eighth grades at Sheridan grade school in Minneapolis before attending Edison High School from which he was graduated in 1942.

That he enlisted in the U.S. Navy in the summer of 1942 and served in both the Atlantic and Pacific theatre operations before receiving his honorable discharge on January 11, 1946.

That he entered Macalester College in Saint Paul from which he graduated in 1952 with a Bachelor of Arts Degree with a major in Journalism. That while attending Macalester College he worked for Sears, Roebuck and Company, Grain Belt Brewery, Yellow Cab Company and worked nights at the Minneapolis Post Office.

That after graduation from Macalester College he worked for approximately fourteen months as a salesman for Life TV in Minneapolis in 1953 and 1954.

That from 1954 to 1958 he was employed as a salesman for Northern Air Conditioning in Minneapolis and thereafter for approximately one year was employed as a salesman for Yale Engineering Company in Minneapolis until he was severely injured in an automobile accident.

That for approximately one year after his car accident his wife worked as a waitress at Jax Cafe in Minneapolis.

That from the fall of 1961 until May 1962 he was employed by Telostat Corporation in Hopkins, Minnesota.

That since the spring of 1962 he and his wife have been conducting a costume jewelry business under the name of Ferris Enterprises.

That he was married to Eve M. Mastrian in 1957 and they have lived in the same home at 8032 Madison Street Northeast Spring Lake Park, Minnesota, since 1958 and they still reside at that address.

That he and his wife have two children and that the two children were baptized at Saint Timothy's Catholic Church, Spring Lake Park, Minnesota.

That he is presently a member of Veterans of Foreign Wars Ballentine Post Number 246 in Minneapolis.

That for a period of approximately six years prior to joining the VFW Ballentine Post he was a member of the American Legion Richfield Post and American Legion Falldin Post Number 555 in Minneapolis.

That he has never been incarcerated in a penal institution. That he does not have means with which to meet either the collateral or premium for a $100,000.00 bail bond.

NORMAN MASTRIAN

(Jurat)

Exhibit 3B

State of Minnesota — District Court
County of Ramsey — Second Judicial District

STATE OF MINNESOTA

vs.

NORMAN MASTRIAN

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

Edward J. Drury, being first duly sworn on oath, deposes and states as follows:

That he is the attorney representing Norman Mastrian in the above entitled action.

That he inquired of the Hennepin County Attorney's Office as to whether that office had a bail list for various offenses and was informed that the County Attorney's office in Hennepin County does have a bail list which is a general guide to the amount of bail requested for various offenses.

That the Hennepin County Attorney's Office bail list calls for bail in the amount of $10,000.00 for first degree murder, your affiant was informed.

That your affiant was informed that the bail for Ronald Steeves, presently on trial for first degree murder in Hennepin County was set at $15,000.00.

That to the best of your affiant's knowledge and belief, the bail for Robin Shetsky was set at $20,000 and the bail for Dr. Axelrod was set at $15,000 before trial and $50,000 on appeal after conviction and sentence.

Further your affiant sayeth not.

EDWARD J. DRURY

(Jurat)

Exhibit 3C

State of Minnesota — District Court
County of Ramsey — Second Judicial District

STATE OF MINNESOTA, *Plaintiff*

vs.

NORMAN MASTRIAN, *Defendant*.

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

Mrs. Helen Mastrian, being first duly sworn on oath, deposes and states as follows:

That she is the mother of Norman Mastrian, the defendant in the above entitled action.

That she and her husband, Joseph Mastrian, reside at 2132 Grand Northeast, Minneapolis.

That they have lived in Minneapolis since moving from Duluth in 1936.

That her husband, Joseph Mastrian, has worked for the same company, George A. Clark and Sons, in Minneapolis since the family moved to Minneapolis in 1936.

That she has four children besides her son Norman, three of whom are married, and all live in the Minneapolis area.

That her son, Norman Mastrian, was born in Duluth on December 7, 1924, and attended Saint Anthony parochial grade school in that city.

That after the family moved to Minneapolis, her son Norman attended Sheridan grade school and Edison High School in Minneapolis from which he graduated in 1942.

That while in high school Norman participated in the Golden Gloves boxing competition.

That Norman enlisted in the United States Navy in 1942 and was honorably discharged in 1946.

That he thereafter entered Macalester College in Saint Paul and graduated from that school and while going to school had a number of different jobs.

That after graduating from Macalester College, her son Norman worked at Life TV in Minneapolis, Northern Air Conditioning Company, Yale Engineering Company, and the Telostat Corporation.

That her son Norman was married to Eve M. Mastrian in 1957 and that they have two children and have lived in the same home since 1958.

HELEN MASTRIAN

(Jurat)

Exhibit 4

State of Minnesota
County of Ramsey

District Court
Second Judicial District

STATE OF MINNESOTA, *Plaintiff*

vs.

NORMAN MASTRIAN, *Defendant*

File 21133

ORDER DENYING REDUCTION IN AMOUNT OF BAIL

Defendant's motion for a reduction in the amount of bail came on for hearing before the undersigned under date of May 22, 1963. Defendant appeared in person and was represented by Edward J. Drury, Esq., 809 Commerce Building, St. Paul 1, Minnesota. The State of Minnesota was represented by Stephen L. Maxwell, Esq., Assistant Ramsey County Attorney, 328 Court House, St. Paul 1, Minnesota. The matter was submitted on affidavits submitted on behalf of the defendant and upon oral arguments of counsel.

After due consideration, the motion is denied. The memorandum attached hereto is made a part of the within order.

Dated at St. Paul, Minnesota, this 23rd day of May, 1963.

JOHN W. GRAFF
District Judge

MEMORANDUM

The defendant has made a motion seeking an order reducing the amount of bail in this case. Defendant contends that the amount of bail previously set in the amount of $100,000.00 is arbitrary, unreasonable and excessive and violates the provisions of both the Constitution of the State of Minnesota and of the United States.

Article I, Section 5 of the Constitution of the State of Minnesota provides that excessive bail shall not be required. The Constitution does not state what is or is not excessive, and as far as I know there is no state statute implementing the constitutional provision as to what is or is not excessive. In this connection M.S.A. 629.52 provides that bail may be taken in such sum as in the opinion of the judge will secure the appearance of the accused at the court where he is to be tried.

The defendant in this case was under date of May 8, 1963, indicted by the grand jury which indictment charges the defendant with having committed the crime of murder in the first degree. The penalty for murder in the first degree prescribed by statute (M.S.A. 619.[illegible]) is imprisonment for life in the state prison. Prior to the Act of April 22, 1911, Chapter 387, murder in the first degree was punishable by death. M.S.A. 629.52, prior to the amendment of April 20, 1961, Chapter 561, Section 16, provided that a person punishable by death shall not be admitted to bail "if the proof is evident or the presumption great." However, prior to the 1961 amendment of M.S.A. 629.52 it was clear that a person charged with murder in the first degree was entitled to bail before conviction. See *State v. Pett*, 253 Minn. 429, 92 N.W. 2d 205.

The State in this case does not deny that the defendant is entitled to bail but insists that bail should not be less than

$100,000.00. This is the amount which has heretofore been fixed and which defendant by this motion seeks to have reduced. Defendant contends that the amount is excessive. Defendant has filed affidavits that he has been a resident of the state during his entire lifetime with the exception of his military service, that he has a home in Spring Lake Park, Minnesota, where he has resided with his wife and family since 1958, that he has some property but cannot raise the necessary amount that would be required to pay the premium on a $100,000.00 bond nor can he put up the necessary collateral that would be required for such a bond. Upon inquiry by the Court, the defendant has indicated he could post a $20,000.00 bond. The State contends that in the murder charged by the indictment the defendant Mastrian was the person who procured another to do the killing; that the seriousness of the charge, the implication of Mastrian as such procurer, the fact that upon conviction life imprisonment may be imposed require that bond be set in a sufficiently high amount to assure his appearance in court. The State contends that the amount of bail should not be less than $100,000.00.

In re application of Shetsky for Return of Bail Money, 239 Minn. 463, 60 N.W.2d 40, the Court made the following statements concerning bail at pp. 470-471:

> "The purpose of a recognizance or bail bond is to secure the attendance of the accused in order that all questions touching upon his guilt or innocence may be determined. . . ."
>
> "The primary purpose of bail in a criminal case is . . . to insure the prompt and orderly administration of justice without denying liberty to the accused whose guilt has not been proved. Its purpose is to relieve the accused of imprisonment and the state of the burden of detaining him pending the trial and at the same time, by placing

him in the protective custody of a surety—a jailer of his own choosing—, to insure his presence for trial at the call of the court without in any way delaying, impairing or unduly burdening the administration of justice or in any manner prejudicing the state in its prosecution."

With these principles in mind and the provisions of M.S.A. 629.52 that bail shall be taken in such sums as in the opinion of the judge will secure the appearance of the defendant, and having in mind the seriousness of the offense with which the defendant is charged, it must be apparent, based upon what has been presented to the Court, that bail must be in a substantial amount. The amount which the defendant can furnish, viz. $20,000.00, is not, based upon which has been presented to the Court, regarded as sufficient to secure the appearance of the defendant. It may well be a moot question as to what amount may be sufficient to secure his appearance since it must be more than $20,000.00 and the defendant has indicated he cannot raise more than this amount. Under these circumstances no sound reason is perceived at this time, based upon what has been presented, why any change should be made in the amount of bail of $100,000.00 which is the amount at which it is presently set.

GRAFF, J.

Exhibit 5

State of Minnesota
County of Ramsey

District Court
Second Judicial District

STATE OF MINNESOTA, *Plaintiff*

vs.

NORMAN MASTRIAN, *Defendant*

NOTICE OF APPEAL

File No. 21133

To: Clerk of District Court, Second Judicial District; William Randall, Ramsey County Attorney; Walter F. Mondale, Attorney General, State of Minnesota; Supreme Court, State of Minnesota.

PLEASE TAKE NOTICE that the undersigned defendant, by his attorney, Edward J. Drury, hereby appeals to the Supreme Court of the State of Minnesota from the Court's Order Denying Reduction in Amount of Bail in the above-captioned case entered on the 23rd day of May, 1963.

NORMAN MASTRIAN
By: EDWARD J. DRURY
Attorney for Norman Mastrian
809 Commerce Building
St. Paul, Minnesota

Exhibit 6

No. Sp. — Ramsey County — Per Curiam

STATE OF MINNESOTA, *Respondent*

39134 vs.

NORMAN MASTRIAN, *Appellant*

Endorsed: Filed June 28, 1963
Mae Sherman, Clerk, Minnesota Supreme Court

SYLLABUS

The record fails to establish abuse of discretion in refusing application to reduce the $100,000 bail fixed by the district court for defendant indicted for murder in the first degree.

Affirmed.

OPINION

PER CURIAM

On May 8, 1963, defendant Norman Mastrian was indicted by the grand jury of Ramsey County for murder in the first degree. Bail was set by the district court at $100,000. An application for reduction was denied and defendant appeals.

We review the order although the question of whether appeal is available in such a case is doubtful.[1] Constitu-

[1] See, Minn. St. 632.01; State v. Saha, 169 Minn. 514, 211 N. W. 469.

tional rights are involved,[2] and since no question is raised by the state, the record presented to us is reviewed for an answer to the following issue: Did the trial court abuse its discretion in fixing bail in the amount specified and in refusing reduction upon application?

The purpose of arrest and confinement of a person charged with a crime is to assure his presence at the time fixed for his trial.[3] The purpose of bail in cases such as this is to permit his release if appearance at trial can otherwise be guaranteed. The amount of bail which will accomplish the objective is for determination by the court having jurisdiction over the defendant when the bail is fixed.[4] Factors for consideration include:

(1) The seriousness of the offense charged and the severity of the punishment to be imposed if defendant is found guilty.

(2) The physical condition of defendant.

(3) The ability of defendant to provide bail in an amount less than that initially fixed but adequate to meet the minimal requirements of the situation.

(4) The circumstances of the case pointing to the likelihood of defendant's appearance if released on bail including his past history; his relationship to the community at the time of his arrest; and the circumstances of his apprehension.[5]

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[2] Minn. Const. art. 1, §§ 5, 7; U. S. Const. Amend. VIII.

[3] See, Minn. St. 629.30; 6 C. J. S., Arrest, § 1.

[4] In re Application of Shetsky for Return of Bail Money, 239 Minn. 463, 60 N. W. (2d) 40.

[5] 8 Am. Jur. (2d) Bail and Recognizance, § 13, and cases cited; Forest v. United States (8 Cir.) 203 F. (2d) 83, certiorari granted, 348 U. S. 935, 75 S. Ct. 361, 99 L. ed. 733; Gusick v. Rojes, 72 Ariz. 233, 233 P. (2d) 446; Wadley v. Justice Court, 175 Cal. App. (2d) 426, 1 Cal. Rptr. 382.

[6] See cases collected in Annotation, 72 A. L. R. 801; 8 Am. Jur. (2d) Bail and Recognizance, §§ 39 to 45, 71.

In reviewing the decision made by the district court, the view of the trial judge will be accepted unless defendant shows that the discretion exercised was abused so as to deprive him of his constitutional rights.[7]

We are called upon to reverse the order of the district court upon a showing that in other cases involving murder in the first degree bail has been and is generally fixed at a substantially lower amount, and that defendant is wholly unable to produce a bail of $100,000. We cannot determine from the showing made what bail defendant contends would be adequate and possible for him to secure, but the trial court in its memorandum states that defendant suggested a bond in the amount of $20,000. In light of the decisions of other courts,[8] we do not feel that defendant has established a deprivation of his constitutional rights.

The decision of the trial court is affirmed. The right of defendant to move for a speedy trial in the event he cannot make bail may be the solution to his problem. Further, our decision is without prejudice to the right of defendant to make further application with such additional evidence as this opinion may suggest.

Affirmed.

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[7] See, Kennedy v. Corrigan, 169 Neb. 586, 100 N. W. (2d) 550; Ex parte Malley, 50 Nev. 248, 256 P. 512, 53 A. L. R. 395, and Annotation, 53 A. L. R. 399.

[8] People ex rel. Rao v. Adams, 296 N. Y. 231, 72 N. E. (2d) 170; United States v. Dioguardi (2 Cir.) 237 F. (2d) 57; Cohen v. United States, 82 S. Ct. 8, 7 L. ed. (2d) 13; Lupino v. United States (8 Cir.) 258 F. (2d) 792. For a discussion of the limitations on the right of a court to fix bail, see Stack v. Boyle, 342 U. S. 1, 72 S. Ct. 1, 96 L. ed. 3. See discussions in 51 Mich. L. Rev. 389, 41 Yale L. J. 293; 60 L. Rev. 1154.

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No. 494

NORMAN MASTRIAN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF OBJECTIONS TO PETITION

Respondent, State of Minnesota, appears and opposes the Petition for Writ of Certiorari in the within matter for the following reasons:

A. The history of the proceedings in the case thus far indicate clearly that Petitioner has at no time been deprived of any constitutional rights or privileges. On the contrary, the record shows a complete and thorough solicitude on the part of the judiciary and officials involved to the end that

the constitutional and statutory rights of Petitioner be protected at all times. Petitioner has had the benefit of the advice of competent counsel at all times, and has enjoyed a thorough and impartial review on the issues involved by the Courts of the State of Minnesota. The correct Federal constitutional principles have been applied.

B. The trial of the criminal proceedings involved in the within matter will hopefully take place in the immediate future, at which time the issues raised in the within Petition for Writ of Certiorari will become moot. This event may possibly occur before this Court could issue its Writ of Certiorari in the matter; and almost certainly will occur before a decision could be made upon the argument necessarily involved in a hearing of the matter on the merits.

ARGUMENT

Under the history of the proceedings had in the within matter thus far, the Court will note that the Petitioner, Mastrian, has been incarcerated in the Ramsey County Jail since April 18, 1963. The bail for his release was set by the Municipal Court, Judge David E. Marsden presiding, in the amount of $100,000.00. Under the statutes of the State, particularly M.S. 1961, Section 629.44, this authority is conferred upon the Municipal Court. This amount of bail was re-examined in the Ramsey County District Court when the Indictment of the Grand Jury was returned, and the District Court, the Honorable John W. Graff presiding, also set bail for this Petitioner at $100,000.00. Upon a motion for reduction of bail filed by this Petitioner in the Ramsey County District Court, the particular issue was raised with reference to the amount of bail, and a thorough consideration of the

matter was given by Judge John W. Graff. The attention of this Court is invited to the learned memorandum of Judge Graff, which has been printed in the Petitioner's moving papers at page 22. This Court will note that in the main Judge Graff relied upon the opinion of the Minnesota Supreme Court in the case of *In Re Application of Shetsky for Return of Bail Money*, 239 Minn. 463, 60 N.W. 2d 40. In his memorandum the Judge clearly stated the basis and principle upon which he relied in denying the application for reduction in bail. These were the sound and proper constitutional principles. The bail was therefore allowed to stand at the figure of $100,000.00, which was a reflection of the opinion of Judge Graff as to the amount necessary and proper. This Order of the District Court was appealed to the Minnesota Supreme Court, and on this appeal the matter was again examined and given review by the Minnesota Supreme Court on briefs submitted by both the Petitioner and the State. After consideration of the matter, that Court was of the opinion that the Defendant had not established a deprivation of his constitutional rights. The basis for the opinion of the Minnesota Supreme Court is clearly stated in that opinion, a copy of which is printed commencing at page 26 of the Petitioner's moving papers. This Court will note that specific reliance was placed upon the proper Federal authorities, and that the Minnesota Supreme Court, as well as the Ramsey County District Court, has applied the proper Federal standards to facts in this case to support their decisions that the constitutional rights of this Petitioner have been protected.

Three separate Courts have independently, therefore, reviewed the facts involved in this matter, and have come to a conclusion that bail set in the amount of $100,000.00 is rea-

sonable and proper under the circumstances, and that the order setting bail in this amount does not deprive Petitioner of his constitutional rights in any manner.

EVIDENCE BEFORE THE COURTS

A statement or inference is raised in the Petitioner's moving papers for this Writ to the effect that the prosecution should introduce evidence and make affidavits and allegations in support of or explanation of the request for the amount of bail. The Petitioner points out that he has filed affidavits. This issue was raised in *Carbo v. United States*, 288 Fed. 2d 282 (1961), 9th Circuit. In this case the Court stated at page 286:

> "In referring to a reasonable foundation we are not speaking in terms of kinds of evidence, such as all testimony or documentary evidence—or even of affidavits. Where such a problem develops on short notice at the outset or during the progress of a trial, the trial court may well be entitled to rely upon oral representations of counsel, or the Court's own observations, or even the 'feel' of the atmosphere of the trial."

The attention of the Court is respectfully invited to the inherent problems of a criminal trial dealing with a crime which has caused a great deal of public interest and notoriety. The Defendant is entitled to be tried by a fair and impartial jury. The United States Circuit Court of Appeals, Second Circuit, has indicated in *United States v. Dennis*, 313 Fed. 2d 364 (1963), that reversible error may occur where potential jurors are affected by pre-trial publicity. On page 373 is found the following language:

> "The opinions formed in this case, moreover, were based not solely on accounts of the crime at issue, but on ac-

counts of admissions of many other crimes not on trial, and on *accounts containing expressions * * * of the district attorney.*" (Emphasis supplied.)

In the same case, on page 372, is a reference "to obviate the effects of prejudicial publicity *to which the district attorney had heavily contributed.*" (Emphasis supplied.) Any affidavits filed in the District Court proceeding would be a matter of record and consequently available to the news, radio, and TV media. It was with this thought in mind that the State chose to rely on representations made in Court to the presiding judge in such a manner as to be unavailable to the various news media for use which might later prove to be prejudicial to the Defendant. It is apparent from the memorandum accompanying the District Court order that the presiding judge understood the State's position and representations, and properly exercised his discretion in continuing bail at $100,000.00.

LAW APPLIED BY THE COURTS

The Federal law outlining the tests to be applied by the Courts in arriving at a proper bail figure is outlined in the case of *Carbo v. United States*, 82 Supreme Court 662 (1962). Also see *United States v. Dio Guardi*, 287 Fed. 2d 57, and *Lupino v. United States*, 258 Fed. 2d 792, and *Cohen v. United States*, 7 L. Ed. 2d 13; 82 Supreme Court 8. These cases outline tests and standards which are substantially in conformance with those outlined by the Supreme Court of the State of Minnesota and those relied upon by the District Court of Ramsey County, and indeed spelled out in Minnesota Statutes and the Minnesota Constitution. It is submitted that the tests

applied by the State Courts in this matter have been those which have been applied by the Federal Court when the question has been raised, and that Petitioner's rights under the Federal Constitution have been adequately protected in the matter.

THE ISSUES WILL BECOME MOOT

Under Minnesota Statutes (M.S. 631.02) and local practice, the issues with reference to bail are re-examined upon commencement of trial. The defendant may be committed to custody during trial or bail may be continued. In any event, upon completion of the trial bail terminates. In event of appellate proceedings, a new application for bail may be made by the defendant. It is submitted that the suggestion of the Minnesota Supreme Court in its opinion that the right of the Defendant to move for a speedy trial in the event he can not make bail may be the solution to his problem is appropriate to Petitioner's position. The State moved to commence trial on October 7, 1963, and at a hearing on that motion before the District Court the defendant requested the Trial Court not to set the matter for trial until after November 1, 1963. The Court set the matter for trial on November 18, 1963.

With reference to the jurisdiction of the Court in the matter, the attention of the Court is invited to the State Supreme Court opinion indicating that its opinion in the matter was rendered without prejudice to the right of the defendant to make further application with such additional evidence as the opinion of the State Supreme Court suggested. In this regard it may be suggested to this Court that the Court may be without jurisdiction in the matter for lack of a final judgment or

order of a State Supreme Court. By its nature, the matter involved in this Petition should not be heard without a reference to a master or referee for the purpose of obtaining additional evidence from the State before a determination is reached as to a proper bail amount. It may be that this element in the case removes the matter from the jurisdiction of this Court.

CONCLUSION

For the reasons outlined herein, it is respectfully requested that the Petition for Writ of Certiorari in the within matter be denied.

Respectfully submitted,

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ARGUMENT

Respondent suggests in its brief that representations of some nature were presented to the lower court in connection with either the setting of bail or the motion to reduce bail. Respondent states at page 5 of its brief, as follows:

> "It was with this thought in mind that the State chose to rely on representations *made in Court* to the presiding judge in such a manner as to be unavailable to the various news media for use which might later prove to be prejudicial to the Defendant." (Emphasis supplied.)

No representations or evidence of any kind was tendered the presiding judge in Court. If representations were made by the State, they were presented to the Court at an ex parte hearing and, consequently, were unavailable to the petitioner who could not counter them or test their veracity. The petitioner submits that this is not the type of hearing set forth as a requirement in *Stack v. Boyle*, 342 U.S. 1, 6, 72 S. Ct. 1, 4 (1951), for the protection of a person's constitutional rights.

The Respondent argues at page 6 of its brief that the bail issue will become moot since the matter is set for trial on November 18, 1963. At the hearing when the November date was set, William B. Randall, Ramsey County Attorney, indicated that since a companion case was going to trial on October 28, 1963, and might take some weeks to complete, the most likely prospect for trial in petitioner's case would be in January, 1964.

Respondent also suggests that the Minnesota Supreme Court judgment may not be final and that the bail matter should be referred to a referee so that the State can produce additional evidence. The petitioner at the outset of this case submitted its evidence and requested the State to do the

same and to comply with *Stack v. Boyle*. The State refused. The petitioner submits that by the very nature of his peculiar situation, for review of the lower court's determination to be effective and for preservation of his rights, the bail issue must of necessity be separable from the main case and be decided now. The State should not be allowed a hearing at this late date for the introduction of evidence before a Referee.

The petitioner submits that the Minnesota Supreme Court judgment affirming the lower court's denial of the motion to reduce bail is a final judgment as to the bail issue. The petitioner has presented the facts as to his background and finances and for all practical purposes there is nothing more to present to the Court. The Minnesota Supreme Court affirmed the lower court's order and that is a final judgment.

Respectfully submitted,

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